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NO. 80-2202

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

BALLY MANUFACTURING CORPORATION,
a Delaware corporation,
Appellant,

vs.

NEW JERSEY CASINO CONTROL COMMISSION,
Appellee.

On Appeal from the Supreme Court of New Jersey

MOTION TO DISMISS

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Questions Presented

1. Assuming for purposes of this motion to dismiss that the limitation imposed by Appellee New Jersey Casino Control Commission through the so-called 50% regulation would conflict with the Sherman Act, 15 U.S.C. §1, if such limitation resulted from purely private concerted activity, is there a substantial federal question presented as to whether the regulation qualifies for the state action exemption of *Parker* v. *Brown*, 317 U.S. 341 (1943) or otherwise qualifies for exemption from the Sherman Act:

(a) where the Casino Control Act, N.J.S.A. 5:12-1 *et seq.*, as authoritatively construed by the New Jersey Supreme Court, not only authorizes but mandates the Appellee to regulate, control and prevent economic concentration in casino operations and the industries which provide essential goods and services to the casinos;

(b) where the Casino Control Act vests the Appellee, a state agency, with exhaustive and exclusive authority to strictly regulate and control the New Jersey casino industry and the industries which provide goods and services to the industry in order to achieve the law enforcement, social and economic policies of the Act;

(c) where the Casino Control Act expressly enjoins the Appellee to adopt regulations governing the manufacture, distribution, sale and servicing of gaming equipment, including slot machines; and

(d) where the products subject to regulation, slot machines, have been removed by Congress from the protection of the Commerce Clause and have been declared contraband under New Jersey penal laws, unless utilized in legalized casino gaming in accordance with the Act and the regulations of the Commission?

2. Does the selection of a mathematical figure and the placement of such figure at 50% in the challenged regulation by Appellee, the state agency with responsibility to prevent harmful economic concentration in the casino gaming industry and with expertise regarding the needs and problems of this developing industry, raise a substantial federal question based on the doctrine of substantive due process?

3. Is a substantial federal question under the Due Process Clause (or an important federal question which has not been but should be decided by this Court) presented by the Appellee's adoption of the challenged regulation, a rule of general applicability and prospective effect, in accordance with the rule-making provisions of the New Jersey Administrative Procedure Act, N.J.S.A. 52:14B-1 *et seq.*, where the quasi-legislative action was based on indisputable findings regarding the economic concentration in the slot machine market and the importance of slot machines to the viability of casino gaming in New Jersey?

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MOTION TO DISMISS

Appellee, the New Jersey Casino Control Commission, respectfully moves the Court to dismiss the instant appeal on the ground that the asserted federal questions raised by Appellant are manifestly insubstantial. Further, as to the matters described in the third question, Appellee moves to dismiss on the additional ground that such issues are not within the appellate jurisdiction of this Court under 28 U.S.C. §1257(2). In the alternative, Appellee requests

that the matters described in the third question be deemed a petition for certiorari and that such petition be denied on the grounds that such matters, as resolved by the New Jersey Supreme Court, neither present an important federal question which has not been, but should be, settled by this Court nor conflict with any applicable decisions of this Court.

Statement of the Case

At its public meeting of December 20, 1978, the Appellee approved for publication a proposed regulation concerning slot machines. The proposal provided that no more than 50% of a casino's slot machines could be manufactured by any one manufacturer. An exception to this limitation was provided for in cases where a casino had made a good faith effort to obtain slot machines from more than one manufacturer, but there was an insufficient supply of adequate machines to permit compliance with the limitation. (B.A. 36 to 38).[1] As required by the New Jersey Administrative Procedure Act, N.J.S.A. 52:14B-1 *et seq.*, the proposal was published in the February 8, 1979, issue of the New Jersey Register, 11 N.J.R. 108, and the Appellee subsequently received and reviewed written submissions filed by numerous interested parties.

The proposed regulation was prompted by two factors. First, the Appellee's experience up to December 20, 1978, revealed that slot machines accounted for a substantial amount of a casino's business. Counsel for the Appellee noted during the December 20, 1978, meeting that:

> [t]he slot machine industry, of course, is of primary concern to casinos since slot machines account for

[1] The notation "B.A." refers to the appendix to Appellant Bally's jurisdictional statement.

> a significant portion of the gaming revenue derived by casinos and approximately counts right now for approximately [sic] 40 to 50 percent of that revenue. (B.A. 37).

The second factor was that there appeared to be economic concentration in the domestic slot machine market and the potential for this economic concentration extending to the Atlantic City market. (B.A. 37).

Appellee's experience in these respects was confirmed in written submissions filed with the Appellee. For example, in October 1978, Paine Webber Mitchell Hutchins, Inc., (Paine Webber) issued a report on Appellant. This report, which was provided to the Appellee, noted that Appellant is "the world's leading slot machine manufacturer" and "has an estimated 80% share of the U.S. market." (C.A. 4).[2] The report went on to "estimate that, unitwise, Bally will account for about 80% of all slots sold in the U.S. in 1978 and about 90% based on dollar value." (C.A. 7). It concluded by predicting that "BLY's [Bally's] 80% market share and product leadership assures them of the bulk of all slot machine sales for at least the next several years." (C.A. 15). Moreover, during the June 20, 1979, public hearing on the adoption of the proposed regulation, Appellant's counsel acknowledged its market dominance in the following colloquy with Chairman Lordi:

> Chairman Lordi: I didn't say a monopoly. I said that statements have been made to the effect that they [Bally] do indeed sell 80 to 85 percent of the slot machines that are—

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[2] This notation refers to the appendix to the instant brief. Only the pertinent pages of referenced reports are included in the appendix to avoid needless duplication of irrelevant material.

> [Appellant's Counsel]: That I am not quarreling with. (B.A. 94).

Appellant has also acknowledged that it lacks effective competition in the domestic slot machine market. In a report filed with the Securities and Exchange Commission and submitted to the Appellee, Appellant observed that:

> Several manufacturers of slot machines in England are significant competitors of the Company in the United Kingdom and two manufacturers in Australia are significant competitors in that market. Although no industry statistics are available, the Company does not believe that it has significant competition in the sale of slot machines in the United States or in any other country (other than those mentioned above) where it markets slot machines, although there are a number of companies throughout the world that manufacture slot machines. (C.A. 1).[3]

Similarly, the Paine Webber report noted the absence of effective competition in the slot machine industry and the serious difficulties which would be faced by a firm entering the field:

> . . . other than Bally and possibly the small privately owned Nevada-based Jennings Corp., no one has made a successful penetration of the slot machine market. While we believe it is financially possible to enter the slot machine market (our estimate is that it would take about a $15 to $25 million investment), we believe anyone new starting to sell slots today would have to wait at least

[3] The referenced report is the Form 10-K for the fiscal year ended December 31, 1977, filed by Appellant with the Securities and Exchange Commission.

three years before they begin to get a return on their investment. We arrive at this conclusion based on the belief that the cost of a slot machine, in determining whether it can be marketed effectively, is secondary in importance to its reliability and popularity with slot players; for the slot machines that make the most money are in high volume locations where they are set to pay back to the player often as high as 97% of what players put in them. Hence, at locations such as these, downtime and lack of popularity are what a casino operator can least afford if he wishes to stay in business. Thus, if a casino operator can be persuaded to install new untested slots in his casino, most likely it will be relegated to a low volume, out-of-the-way location. At this type of location, it will get the same amount of play in six months to a year that slots located in the prime high traffic locations get in a week to a month. Therefore, the quantity tested and accumulated experience on a slot machine from a new manufacturer will not be sufficient, we believe, until the casino operator has had a limited number of functional machines for approximately three years. It is our contention that this long lead time needed before initial payback will discourage most potential competitors from entering the slot machine market. (C.A. 7-8).

In addition to recognizing Appellant's dominant role in the slot machine market, the reports submitted to the Appellee strongly demonstrated the importance of slot machines to casino operations. The Paine Webber report observed that "[t]he slot machine is the cornerstone of almost every casino's product mix," (C.A. 4)

and noted that "[w]ithout slot machines, it is questionable how many of Nevada's 'successful' casinos could remain profitably in business." (C.A. 6-7). Appellant's own 1977 Annual Report agrees with these observations and states:

> The importance of slot machines to the gaming industry is evidenced by the fact that revenues from slot machines accounted for approximately 38% of gross gaming revenues in Nevada in 1977. (C.A. 17).

In this respect, the Paine Webber report points out that as the casino industry expands, slot machines are likely to play an even greater role because they are easy to manage.

> Probably the scarcest commodity in the casino industry is skilled managerial talent. Since slot machines make fewer demands on managerial time, it is reasonable to expect that if there are a larger number of new casinos, slot machines will play even a more prominent part in these casinos than they have until now. (C.A. 11-12).

Appellee considered the proposed regulation during its public meeting of June 20, 1979. After hearing oral presentations by interested parties, including Appellant's counsel and antitrust expert, the Appellee voted to adopt the regulation. (B.A. 55 to 106). The regulation was filed with the New Jersey Secretary of State on June 28, 1979, and is codified in the New Jersey Administrative Code as N.J.A.C. 19:46-1.32. It reads in full:

> (a) Unless otherwise approved by the Commission, no more than 50% of the slot machines used in any casino in this State to conduct gaming shall

have been manufactured by any one manufacturer or by an enterprise under the direct or indirect control of said manufacturer.

(b) The Commission may modify the said limitation of subsection (a) of this section upon a finding that the casino licensee or applicant for a casino license has made a good faith effort to seek out and obtain slot machines from more than the single manufacturer and that a number of adequate slot machines sufficient to comply with the said limitation are not reasonably available for such use in the said casino.

(c) A casino licensee or an applicant for a casino license may seek modification of the limitation of subsection (a) of this section by filing a verified petition with the Commission alleging sufficient facts to satisfy the standards set forth in subsection (b) of this section.

(d) In response to such a verified petition, the Commission may decide the request summarily, elicit further information from the petitioner or other interested persons, set the matter down for a hearing or adopt such other procedure as may be appropriate under the circumstances.

At the time the regulation was adopted, Resorts International Hotel, Inc., the first casino to begin operations, had agreed voluntarily to purchase no more than 50% of its slot machines from one manufacture. However, it was later discovered that this was not feasible and Resorts International Hotel, Inc., eventually purchased far more than 50% of its slot machines from Appellant. (B.A. 49). At the time the regulation was being considered, Boardwalk Regency Corporation (Caesar's), the second casino

to begin operations, had indicated that it intended to purchase all of its slot machines from Appellant (B.A. 42 and 43), but did not do so in view of the regulation. Bally's Park Place, Inc., which is owned by Appellant, was the third casino to commence operations. On May 21, 1979, Appellee ruled that the then proposed regulation did not apply to a casino's purchase of slot machines from a manufacturer which owns the casino. Thus Bally's Park Place, Inc., is free to purchase all of its slot machines from Bally.[4]

On August 10, 1979, Appellant filed an appeal from Appellee's action to the Appellate Division of the New Jersey Superior Court. While the matter was pending before the Appellate Division, Appellant moved to have the case certified directly to the New Jersey Supreme Court, and the motion was granted. *See* N.J.Ct. R. 2:12-2. On March 17, 1981, the New Jersey Supreme Court rendered its written decision affirming the validity of the challenged regulation and approving the procedures followed by Appellee in adopting it.

Summary of Argument

1. The challenged regulation was promulgated by Appellee, the state agency vested with exclusive authority over casino gaming in New Jersey, pursuant to the comprehensive powers vested in Appellee by the Casino Control Act and pursuant to a specific mandate to regulate, prevent and control potentially harmful economic concentration in the industries which provide goods and services to casinos. The New Jersey Supreme Court, recognizing

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[4] At the time of the state court appeal, Appellee's records reflected that approximately 72% of the slot machines in use in Atlantic City casinos were manufactured by Appellant.

the extraordinary sensitivity of the gaming industry and the Legislature's express intent to exert the strictest possible control over both casinos and their suppliers, properly and authoritatively construed the Casino Control Act as empowering and requiring the Appellee to prevent economic concentration, no matter how obtained, in the vital slot machine market. The Appellee's response to the problem of slot machine market domination was necessary to avoid the threat posed to the state policies of the Casino Control Act, namely, the stability of casino gaming and the integrity of the regulatory process. Moreover, Appellee continuously monitors and supervises importation, sale, service and use of slot machines related to Atlantic City casino operations. Thus, adoption of the challenged regulation and any restraint which it may impose on competition in the Atlantic City slot machine market easily meet both prongs of the test for antitrust immunity of state action as articulated in *Cal. Retail Liquor Dealers Ass'n* v. *Midcal Alum.*, 445 U.S. 97 (1980).

2. The determination to impose a percentage limitation on the amount of slot machines supplied to a casino by a single manufacturer and to set that percentage at 50%, subject to an exception where adequate machines cannot be obtained from alternate sources, was made by Appellee in the exercise of the quasi-legislative authority vested in it by the Casino Control Act. These determinations were within the expertise of the Appellee based upon information about the slot machine industry, the slot machine market in Atlantic City and the expected growth rate of the casino industry. Percentage limitations are appropriate since the very fact of a grossly imbalanced slot machine market threatens the central policies of the Act. The 50% limitation was chosen with the dual purpose of reducing the imbalance to a tolerable level and of providing an in-

centive for manufacturers to enter the market. Since the regulation is subject to review on the narrow grounds of arbitrariness or capriciousness and since the regulation must be sustained if any reasonable set of facts can be conceived to support it and since Appellant has utterly failed to carry its burden of rebutting the presumption of reasonableness, the regulation is not susceptible to serious attack on the basis of substantive due process.

3. In adopting the challenged regulation, the Appellee complied with the rule-making requirements of the New Jersey Administrative Procedure Act. N.J.S.A. 52:14B-1 *et seq.* The proposed regulation was published in the New Jersey Register and comments from interested persons were solicited. Appellant submitted a detailed submission on the proposal which was reviewed by the Appellee and its staff prior to the June 20, 1980, public meeting when the proposed regulation was adopted. (See B.A. 110 to 127). Appellant's counsel and expert was permitted to address the Appellee at the June 20 meeting and restated Appellant's position. (See B.A. 82 to 100). Since the Appellee was considering a rule of general applicability and prospective affect, since the underlying reasons for the rule were matters of policy, general information and law, and since the essential findings in support of the rule were beyond dispute, the procedures followed by Appellee in adopting the rule were fully adequate, fair and proper under established principles of due process.

ARGUMENT

POINT I

Promulgation of the challenged regulation constituted State action in accordance with clearly articulated and affirmatively expressed State policy and any restraint on competition under the regulation is immune from attack under the antitrust laws.

Appellant asserts that the challenged regulation, N.J. A.C. 19:46-1.32, results in a restraint of trade proscribed by the Sherman Act, 15 U.S.C. §1. While it may be argued that the effect of the regulation is actually to encourage competition in the Atlantic City slot machine market,[5] it is unnecessary to do so. It may be assumed for purposes of the instant motion that the restriction imposed by the regulation, that is, a limitation of 50% on the number of slot machines from any one manufacturer in use in any particular casino, would be violative of the Sherman Act if undertaken by agreement among private parties. Nevertheless, the regulation is not subject to challenge on this ground since it clearly falls within the so-called state action exception of *Parker* v. *Brown*, 317 U.S. 341 (1943), as that exception has been refined by subsequent decisions of this Court.

Before addressing the state action issue, it is important to observe that the regulation in question was promulgated by the state agency exclusively entrusted to oversee the casino industry in New Jersey, an industry which was previously illegal in New Jersey and which required approval of a constitutional referendum by the citizenry. N.J.

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[5] The New Jersey Supreme Court so noted without reaching the question. (B.A. 13 n.5).

Const. (1947), Art. 4, §7, par. 2. Casino gaming is plainly a subject of the utmost concern and interest to the State of New Jersey and its people. The Casino Control Act (the Act) mirrors that concern and vests the Appellee with extraordinary power and authority rarely, if ever, found even in other highly regulated industries.

In particular, the Act declares that casino gaming can succeed only if public confidence and trust in the industry and the regulatory process are maintained and, to that end, "the regulatory provisions . . . are designed to extend strict State regulation to all persons, locations, practices and associations related to the operation of licensed casino enterprises and *all related service industries as herein provided.*" N.J.S.A. 5:12-1(b)(6). (emphasis added). Gaming equipment manufacturers, such as Appellant, must obtain licensure under stringent qualification criteria, N.J.S.A. 5:12-12 and -92; and the Appellee is commanded to prescribe regulations governing "the manufacture, distribution, sale and servicing of gaming devices and equipment." N.J.S.A. 5:12-70(i). In addition to the myriad authorizations and powers granted to Appellee throughout the Act, N.J.S.A. 5:12-75 provides:

> The commission may exercise any proper power or authority necessary to perform the duties assigned to it by law, and no specific enumeration of powers in this act shall be read to limit the authority of the commission to administer this act.

Hence, the New Jersey Legislature has delegated to Appellee the full measure of the State's police power to ensure achievement of the social, economic and law enforcement goals embodied in the Act.

Against this historical and statutory background, the State Supreme Court was asked to determine whether the

Act authorized the Appellee to adopt the challenged regulation. This determination focused upon yet another express statement of policy and grant of authority to the Appellee, to wit:

> Since the economic stability of casino operations is in the public interest and competition in casino operations in Atlantic City is desirable and necessary to assure the residents of Atlantic City and of this State and other visitors to Atlantic City varied attractions and exceptional facilities, the regulatory and investigatory powers and duties conferred by this act shall include the power and duty to regulate, control and prevent economic concentration in the casino operations and the ancillary industries regulated by this act, and to encourage and preserve competition. [N.J.S.A. 5:12-1(b)(12)].

Upon a review of the entire legislative scheme and the evils at which it was aimed, the New Jersey Supreme Court held that the quoted section meant precisely what it said, *i.e.*, that the Appellee had not only the power but the duty to regulate, control and prevent economic concentration in the ancillary industries, where such concentration threatened the achievement of the statutory goals of stability and effective control. The State Court further ruled that the concentration need not have been wrongly obtained since the *fact* of market domination respecting an essential commodity would jeopardize competition among the casinos, would subject the casinos to potential influence or economic pressure and would undermine the ability of the Appellee to freely enforce the statute against the dominant supplier (for example, by revocation of the supplier's license) for fear of causing severe hardship to the casinos which depended on the needed product. (B.A. 6-7).

With respect to the challenged regulation, the State Supreme Court declared that the Appellee was mandated to prevent slot machine market concentration since, on the undisputed facts, slot machines are essential to casino viability, the slot machine market was dominated by one manufacturer, and there was an absence of significant competition in the sale of slot machines. "In light of these facts, the Commission was obligated to take action to prevent 'economic concentration' in the slot machine market and to 'encourage and preserve competition.'" (B.A. 9).

In concluding that the Casino Control Act both empowered and directed Appellee to take direct regulatory action against dangerous economic concentration, regardless whether the market dominance resulted from fair competition, the New Jersey Supreme Court ruled on an issue of state law. Although Appellant now seeks to have this Court render its own construction of the Act, it is well settled that such review may not be had. This Court has repeatedly held that the construction given to a state statute by the state's highest court is final and that this Court will not undertake to reach a contrary construction. *E.g., Landmark Communications, Inc.* v. *Virginia,* 435 U.S. 829, 837 n.9 (1978); *Mullaney* v. *Wilbur,* 421 U.S. 684, 691 (1975); *Gurley* v. *Rhoden,* 421 U.S. 200, 208 (1975); *O'Brien* v. *Skinner,* 419 U.S. 524, 531 (1974); *Winters* v. *New York,* 333 U.S. 507 (1948); *Alabama* v. *King & Boozer,* 314 U.S. 1, 9-10 (1941); *Murdock* v. *City of Memphis,* 20 Wall. 540 (1875). Moreover, the language of the Act and the sweep of the legislative scheme repel any suggestion that the State Court's interpretation was manifestly unreasonable or "an obvious subterfuge to evade consideration of a federal issue." *Mullaney* v. *Wilbur, supra,* 421 U.S. at 691 n. 11. From this binding statutory interpretation by the State Court, resolution of the immunity issue follows.

In *Parker* v. *Brown, supra,* the Court found no purpose in the Sherman Act to impose antitrust prohibitions on the anticompetitive activities of the state or its officers in implementing programs or policies promulgated by the state in its sovereign capacity. Since *Parker,* this Court has decided a number of cases where the "state action" doctrine was invoked both successfully and unsuccessfully in defense to antitrust challenges. *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773 (1975); *Cantor* v. *Detroit Edison Co.,* 428 U.S. 579 (1976); *Bates* v. *State Bar of Arizona,* 433 U.S. 350 (1977); *City of Lafayette* v. *Louisiana Power & Light Co.,* 435 U.S. 389 (1978); *New Motor Vehicle Bd. of Calif.* v. *Orrin W. Fox Co.,* 439 U.S. 96 (1978). Protracted analysis and comparison of these decisions need not be undertaken since, in its most recent pronouncement on the subject, this Court has distilled two standards which must be met for *Parker* immunity: (1) the challenged restraint must be clearly articulated and affirmatively expressed as state policy and (2) the policy must be actively supervised by the State itself. *Cal. Retail Liquor Dealers Ass'n* v. *Midcal Alum., supra.*

Appellant has not asserted any deficiency under the second standard. Thus, the question becomes whether the 50% regulation constitutes a clearly expressed, affirmatively articulated state policy. Given the fact that the Casino Control Act not only authorizes but obligates Appellee to adopt regulations controlling and preventing market concentration which threatens the policies of the Act and given undisputed findings reached by Appellee and affirmed by the State Supreme Court regarding the importance of slot machines and the lack of significant competition, the question is hardly difficult or substantial. The State, as sovereign, has spoken plainly and has di-

rected its agent to correct and reallocate the market to achieve a more balanced mix of competitive suppliers.

Of necessity, the Legislature delegated to the Appellee the responsibility to detect troublesome market concentration and to formulate the appropriate regulatory response. Such express delegation to the exclusive state agency vested with plenary control of the casino industry hardly diminishes the fact that the challenged regulations represents a state policy clearly articulated by the Legislature and implemented by its agent in keeping with the policies and purposes of the enabling statute. See *City of Lafayette* v. *Louisiana* v. *Louisiana Power & Light Co.*, 435 U.S. at 415 (plurality opinion of Brennan J.). Effective control of the Atlantic City slot machine industry is an integral and indispensible component of the overall regulatory system. *Compare Cantor* v. *Detroit Edison Co., supra.* Indeed, slot machines are excepted by Congress from the protections ordinarily afforded activities in interstate commerce, 15 U.S.C.A. §1172, and are deemed contraband under New Jersey law unless they are possessed in accordance with the Casino Control Act and Appellee's regulations. N.J.S.A. 2C:37-7. Beyond any doubt, the New Jersey Legislature had the right to instruct its instrumentality to closely supervise the slot machine trade and to adjust unfavorable market conditions by regulation without resorting to extensive antitrust litigation for past infractions. Therefore, the challenged regulation was plainly the progeny of a clear and express state policy administered by a state agency in accordance with explicit statutory goals and purposes. No substantial question appears.

POINT II

The imposition of a percentage limitation on the number of slot machines supplied to each casino by a single manufacturer and the selection of 50% as the percentage were not arbitrary or capricious but were rationally related to legitimate State interests.

Appellant contends that the imposition of a 50% limitation, on the number of slot machines of a single manufacturer which may be used by each casino, constituted an arbitrary and capricious exercise of the regulatory authority granted to Appellee under the Casino Control Act. Appellant argues that no findings of fact were made by Appellee to support either the use of a fixed percentage or the setting of the percentage at 50%. Rather, Appellant asserts that the Appellee was required to adopt the less restrictive alternative proposed by Appellant. (See B.A. 120, 125-126, 136-138). From the viewpoint of federal law, these arguments are without substance or merit.

In proposing and adopting the challenged regulation, the Appellee was acting in the exercise of the legislative authority granted to it by the State Legislature. *See, e.g., United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956). It is settled law that, in reviewing the regulatory enactments of a state administrative agency, this Court will not substitute its judgment for that of the agency and will not disturb the regulation unless it is demonstrably arbitrary or capricious. *E.g., Pacific States Box and Basket Co.* v. *White*, 296 U.S. 1976 ((1935). Moreover, in performing this limited review, the Court will not interfere with the agency's determination if any state of facts reasonably can be conceived to support it. *Id.*, 296 U.S., at 185. The regulation enjoys the presumption that such state of facts exists and the attacking party bears the bur-

den of overcoming the presumption by demonstrating the regulation to be arbitrary. *Id.* In this regard, a regulation adopted by an agency under authority delegated by a state legislature deserves the same deference as is accorded to state statutes. *Id.*, 296 U.S., at 185-186. Thus, specific findings of fact need not be made by the administrative body. *Id.*, 296 U.S., at 186. *Accord Jones* v. *District of Columbia*, 116 U.S. App. D.C. 301, 323 F. 2d 306 (D.C. Cir. 1963).

In the present case, Appellee did find certain general or legislative facts which remain undisputed, specifically, that the slot machine market was dominated by one manufacturer, that the market was marked by an absence of significant competition and that slot machines are critical to the success of casino gaming. (B.A. 9). Appellant's dissatisfaction with the adequacy of these conclusions to justify the regulation stems from Appellee's persistent misconception of the duty imposed upon Appellee and the purpose of the regulation. As demonstrated above, Appellee was authorized and directed to address itself to the *fact* of market domination in essential casino-related goods and services. Once this is understood, the rational relationship between the regulation and the important state interests in effective control of casino gaming becomes obvious. To eliminate the dangers posed by the severely imbalanced slot machine market, as it was developing in Atlantic City during the critical growth phase of the newly established casino industry,[6] Appellee was obliged to take direct and responsive regulatory action. The regulation serves this objective by requiring a balanced and more competitive market structure through the simple but log-

[6] At the time of the adoption of the regulation, June 20, 1979, one casino was in operation and one was about to commence operations. At the time of this writing, there are eight operating casinos with one more scheduled to commence in October 1981.

ical and effective method of a percentage limitation. With regard to the choice of 50% as the limitation, the Appellee balanced the need to reduce domination against the need to provide the competitors an opportunity for a significant market share. While reasonable public officials might differ on this precise figure, it is hardly irrational or unrelated to the valid purposes of the regulation. This is all that is required. *See Pacific States Box and Basket Co.* v. *White, supra.*

For similar reasons, Appellant's contention that Appellee failed to utilize the least restrictive means is equally unavailing. Here again, Appellant misunderstands the reason and purpose of the regulation. The alternative proposal advanced by Appellant (B.A. 136-138), a selective compilation of antitrust and fair competition principles, would not alleviate the Legislature's express concern with market concentration. Moreover, the challenged rule is a state economic regulation. In such matters, the rational relationship test applies. *See Exxon Corp.* v. *Governor of Maryland,* 437 U.S. 117 (1978). Thus, Appellant's contentions lack substance.

POINT III

The procedures followed in the adoption of the challenged regulation fully complied with the requirements of due process.

Appellant asserts that the procedures utilized by Appellee in proposing and adopting the challenged regulation deprived Appellant of due process. More particularly, Appellant contends that there were disputed factual issues as to which Appellant was entitled to the procedural opportunities normally attendant to an adjudicative hear-

ing. Further, Appellant claims that Appellee conducted a "charade" because, in Appellant's view, the decision to adopt the then proposed regulation was reached without any consideration of Appellant's comments and because Appellee allegedly exercised no judgment in the rule-making process but simply deferred to the suggestion previously made by a potential competitor of Appellee.

As noted above, these contentions do not assail the validity of the regulation itself but rather the method in which the regulation was promulgated. Thus, the appellate jurisdiction of this Court under 28 U S.C. §1257(2) is not properly invoked. Rather, these claims must be considered as a petition for certiorari. Even the most cursory review reveals that these contentions fail to meet the standards for granting such a petition. Appellant has not alleged that the decision of the New Jersey Supreme Court on these issues conflicts in any way with a decision of another state court of last resort or a federal court of appeals. Further, no important federal question which should be, but has not been, decided by this Court is implicated and the decision below fully conforms to previous applicable decisions of this Court.

The challenged regulation is a rule of prospective effect and general application. It was adopted by the Appellee in the exercise of its regulatory or quasi-legislative authority. The law is clear that, in so acting, a state agency is not obligated to afford an adjudicative or trial-type hearing to every affected individual but only to provide fair notice of the proposed rule-making and an opportunity for interested persons to submit their views and comments for consideration. *E.g., United States* v. *Florida East Coast R. Co.,* 410 U.S. 224, 226 (1973); *United States* v *Storer Broadcasting Co., supra*; *Pacific States Box and Basket Co.* v. *White, supra*; 2 *Davis, Administrative Law* (2d ed. 1979) §§12:1 - 12:4.

Appellant argues that the usual rule-making procedure was unfair in this case because there were disputed facts which required resolution in a trial setting before the regulation could be adopted. As already stated above, Appellee relied upon certain general facts and information regarding the status of the slot machine market and the necessity of slot machines to casino viability. These facts are beyond dispute. Although Appellant wishes to draw other, irrelevant matters into question, it has no right to do so.

Appellant's allegation that the proceeding was a "charade" is irresponsible and unsupported. Appellee caused the proposed regulation to be published in the February 8, 1979, issue of the New Jersey Register. Appellant subsequently submitted memoranda and an alternative proposal. These submissions, together with those of other interested persons, were fully considered by Appellee and its staff prior to the June 20, 1979, public meeting when the proposed regulation was approved for adoption. Apellant was afforded the additional opportunity to again present its views to Appellee through its antitrust counsel at the public meeting. Having already reviewed the written submission, Appellee was hardly required to further delay its action on the long-pending proposal. Indeed, neither the federal nor New Jersey administrative procedure acts obliged Appellee to receive oral argument on the matter. See 5 U.S.C. §553 and N.J.S.A. 52:14B-4. The mere fact that Appellee's staff favored adoption of the proposed regulation and read a policy statement at the outset of the June 20 hearing proves nothing as to the fairness of the consideration which Appellant's written submissions received.

As to Appellant's contention that the 50% limitation was first suggested by a potential competitor, it need

only be said that the receipt of views and comments from regulated parties is a proper function of a responsible regulatory agency. Further, the instant record manifests that the ultimate determination to adopt the regulation was a judgment made by Appellee pursuant to its statutory obligations and in furtherance of clearly expressed state policy. It matters not that petitions for legislative action may be submitted to the lawfully empowered body by individuals who may stand to gain by the action sought. *Cf. Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). Moreover, Appellant fails to even hint that Appellee was in any way biased in favor of Appellant's competitors or prejudiced against Appellant. Any such insinuation would be preposterous.

Finally, the underlying basis for Appellant's complaint is its assumption that the rule was targeted at Appellant and that its effect would fall most heavily upon it. As to the first, it is simply false. The rule encompasses directly all casino operators in Atlantic City and indirectly every present or future slot machine supplier in that market. In fact, the rule applies the 50% limitation to each casino, not the market as a whole, and thus may prevent additional sales by one of Appellant's competitors, even now when Appellant continues as the leading supplier. As to the second point, the impact of a regulation may often fall immediately and heavily on one party. This alone raises no due process problem. *E.g., United States* v. *Florida East Coast R. Co., supra*, 410 U.S. at 246; *United States* v. *Storer Broadcasting Co., supra.*

In sum, Appellant has not shown any reason why this Court should grant certiorari to hear these ordinary and insubstantial complaints. The applicable principles of procedural due process are well defined and were fully served here.

CONCLUSION

For the foregoing reasons, Appellee respectfully submits tbat the questions discussed in Points I and II herein are so insubstantial as not to require further argument and Appellee respectfully moves the Court to dismiss the appeal on these grounds. As to the questions discussed in Point III herein, no important or novel federal questions are presented and, considering these questions to be brought before the Court on petition for certiorari, Appellee respectfully requests the petition be denied.

Respectfully submitted,

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Counsel for Appellee

[Appendix Follows]

APPENDIX

Excerpt from Page Six of Bally Manufacturing Corporation Form 10K, Filed with the Securities and Exchange Commission for the Fiscal Year Ended December 31, 1977

COMPETITION

Several manufacturers of slot machines in England are significant competitors of the Company in the United Kingdom and two manufacturers in Australia are significant competitors in that market. Although no industry statistics are available, the Company does not believe that it has significant competition in the sale of slot machines in the United States or in any other country (other than those mentioned above) where it markets slot machines, although there are a number of companies throughout the world that manufacture slot machines.

The Company believes that competition in the slot machine market is based primarily on product performance, service and design. Although it is difficult to compare slot machines because of the wide variety of models, the Company believes that the slot machines manufactured by it are priced competitively with similar models manufactured by its competitors. However, the Company believes that because of the wide variety of models offered by it, all of which include devices which provide accounting of income and payouts, and the basic reliability and quality of its machines, the Company is one of the principal slot machine manufacturers in the world.

In the West German market, the Company considers one other manufacturer of German gaming machines as a significant competitor.

C.A. 2

Excerpt from Page Six of Bally Manufacturing Corporation Form 10K, Filed with the Securities and Exchange Commission for the Fiscal Year Ended December 31, 1977

The Company markets flipper-type pinball machines manufactured by it throughout the United States and in some parts of Europe, Asia and Australia. In the flipper-type pinball machine market, the Company competes with several domestic and foreign manufacturers. The Company does not know of any other company presently manufacturing an in-line type pinball machine.

Many companies are engaged in the manufacture and sale of amusement arcade games throughout the world. The Company considers several of these companies, both domestic and foreign, as significant competitors.

The Company believes that competition in the German gaming market, the flipper-type pinball machine market and the amusement arcade game market are all based primarily on the design and player appeal of the various machines. Comparable equipment in these fields is

C.A. 3

Paine Webber Mitchell Hutchins, Inc. Basic Analysis of Bally Manufacturing Corporation (October 31, 1978)

BALLY MANUFACTURING CORP (NYSE:BLY)

Recent Price:	$35½	Indicated Dividend:	$0.10
Last 52 Weeks Range:	$71¾-15	Indicated Yield:	0.3%
Shares Outstanding:	11.9MM	Market Value:	$422MM

Earnings Per Share		*Price/Earnings Ratio*
1975	$0.66	——
1976	1.04	——
1977	1.61	——
1978E	2.50	14.2
1979E	4.50 (4.00-5.00)	7.9 (8.9-5.1)
1980E	6.00 (6.00-8.00)	5.9 (5.9-4.4)

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C.A. 4

Paine Webber Mitchell Hutchins, Inc. Basic Analysis of Bally Manufacturing Corporation (October 31, 1978)

CAPITALIZATION JUNE 1978

$(000)

Long-term Debt	$ 39,903	23.0%
Short-term Debt	11,750	6.8
Stockholders Equity	121,600	70.2
	$173,253	

October 31, 1978

Lee S. Isgur
(212) 437-6243

BALLY MANUFACTURING CORPORATION

RECOMMENDATION AND SUMMARY

The rules regulating gaming are entering a period of rapid liberalization, both nationally and internationally. The common stock and convertible debentures of Bally represent one of the best ways of capitalizing on this change, since:

> The slot machine is the cornerstone of almost every casino's product mix. Bally, the world's leading slot machine manufacturer, has an estimated 80% share of the U.S. market.
>
> Atlantic City, New Jersey is the world's most rapidly growing new market for casino gaming. With the proceeds from its recent $50MM 6% debenture (convertible at $62), we expect Bally will open a new Atlantic City gaming casino in 1979 (which would be the second or third casino).

C.A. 5

Paine Webber Mitchell Hutchins, Inc. Basic Analysis of Bally Manufacturing Corporation (October 31, 1978)

> The pinball machine has become more popular in recent years. Bally, with its innovative development of the solid-state pinball machine, has become the world's leading pinball machine producer, leap-frogging Gottlieb and Williams.

In our opinion, Bally has more "irons in the fire" than any other company with which to capitalize on the liberalization of legislation regulating "games of chance".

The Company

Most people know Bally Manufacturing Corporation as the world's leading slot machine manufacturer. The company today is also the world's leading pinball machine manufacturer. In addition, its Aladdin's Castle operation is probably the leading operator of pinball machines and arcade games in the U.S. Aladdin's Castle operates over one hundred (115 as of June 30, 1978) family amusement machine arcades located principally in major enclosed shopping centers scattered across the United States and Canada. Through several wholly-owned distributors, Bally is also the country's largest distributor of pinball machines. Both Aladdin's Castle and its own distributors handle competitive as well as Bally manufactured products. Thus, these operations, besides contributing to earnings growth, give the company valuable information about how their own products stack up against the competition.

The company has a small electronic consumer game operation which has been plagued by a number of startup problems. Results over the next two Christmas seasons

should indicate whether this will eventually become a viable operation.

The company owns three contiguous hotel properties on nine acres along the Atlantic City boardwalk. Through a combination of refurbishing and new construction (after tearing down certain parts of the original), Bally hopes to have Phase I of its Atlantic City casino/resort complex open about the middle of next year. Assuming the project is successful, this will probably be the first of a number of casinos owned and operated by the company.

BLY does not break out of its earnings by divisions or product lines. Thus, the following breakout is nothing more than a rough estimate on our part.

Estimated Approximate Earnings Per Share By Operation

	1980E	*1979E*	*1978E*	*1977*	*1976*	*1975*	*1973*	*1974*
Slot Machines	$1.50	$0.90	$0.90	$0.60	$0.40	$0.35	$0.60	$0.33
German Gaming Machines	0.60	0.50	0.50	0.45	0.70	0.80	0.75	0.60
Total Gaming Machines	2.10	1.40	1.40	1.05	1.10	1.15	1.35	0.93
Casino Operations	2.30	1.50	—	—	—	—	—	—
Other Operations and Corporate Expenditures	1.60	1.60	1.10	0.55	(0.05)	(0.50)	(0.30)	(0.30)
	$6.00	$4.50	$2.50	$1.61	$1.04	$0.60	$1.05	$0.63

SLOT MACHINES

Without slot machines, it is questionable how many of Nevada's "successful" casinos could remain profitably in

business. Before a casino operator takes delivery of a slot machine, it is normally preset at the factory to pay back over 5000 cycles (plays) a certain percentage of what is put in by the players. Thus, unless the machine is malfunctioning, an operator normally knows exactly how much each machine will win every 5000 cycles. At the same time, unlike other "games of chance" whether they be blackjack, craps, roulette, baccarat, wheel of fortune or what have you, the casino operator does not have to worry about employee shifts, unions etc. when dealing with his slot machines. As one operator told us, his slot machines "don't have to be fed or go on breaks and require no fringe benefits".

Over the past decade, with the growth of Nevada gaming (we estimate over 60,000 slots are now in use in Nevada), a number of companies have announced that they were going to enter the slot machine manufacturing business and challenge Bally's pre-eminent position. (We estimate that unit-wise, Bally will account for about 80% of all slots sold in the U.S. in 1978 and about 90% based on dollar value.) Such companies as Centronics Data and Xcor (formerly Seeburg Corp.) readily come to mind. But other than Bally and possibly the small privately owned Nevada-based Jennings Corp., no one has made a successful penetration of the slot machine market. While we believe it is financially possible to enter the slot market (our estimate is that it would take about a $15 to $25 million investment), we believe anyone new starting to sell slots today would have to wait at least three years before they begin to get a return on their investment. We arrive at this conclusion based on the belief that the cost of a slot machine, in determining whether it can be mar-

keted effectively, is secondary in importance to its reliability and popularity with slot players; for the slot machines that make the most money are in high volume locations where they are set to pay back to the player often as high as 97% of what players put in them. Hence, at locations such as these, downtime and lack of popularity are what a casino operator can least afford if he wishes to stay in business. Thus, if a casino operator can be persuaded to install new untested slots in his casino, most likely it will be relegated to a low volume, out-of-the-way location. At this type of location, it will get the same amount of play in six months to a year that slots located in the prime high traffic locations get in a week to a month. Therefore, the quantity tested and accumulated experience on a slot machine from a new manufacturer will not be sufficient, we believe, until the casino operator has had a limited number of functional machines for approximately three years. It is our contention that this long lead time needed before initial payback will discourage most potential competitors from entering the slot machine market.

In the meantime, as a means of further strengthening its market position, BLY has spent over three years and several million dollars developing a sophisticated system, which can put its slot machines on-line with a computer. This system is designed to instantly provide a readout to casino management through the casino's computers of the condition of the machine with regard to security, cash, maintenance and pay-out ratios. The first one of these systems is now in operation, having successfully completed its extensive and lengthy on-site test at the Las Vegas Hilton (780 slots). Another one is presently being installed at the Flamingo Hilton in Las Vegas (685 slots). We ex-

pect BLY will soon begin offering similar on-line slot machine computer systems (known as SDS II for Slot Data System II) to other casino operators. We see three very important aspects of this development:

> An on-line slot machine system will not only be more secure from vandalism, but should result in significantly less downtime for slot machines and require less casino personnel for support.
>
> The successful development of the on-line system should give BLY a further significant lead over any potential slot machine manufacturers.
>
> We believe that the successful development of these on-line systems will result in BLY being able to upgrade many existing slot machine installations to this level of sophistication. Also, we believe a significant number of new orders will be for this on-line equipment. This should result in the average unit value per slot machine shipped rising significantly. We estimate that BLY realized substantially in excess of $1MM from the sale of this system with a very high profit margin. Since HLT will have over 1,000 slots on this system, this would mean a cost to HLT of about $1,000 more per slot and, similarly, this much more to BLY on a per slot basis.

The U.S. Treasury Department has been authorized to mint a new dollar coin that will be slightly larger than a quarter. This is expected to come into widespread use in 1980. It will require the replacement or retrofitting of many existing $1 slot machines and, to the extent that it stimulates greater use of dollars, it should result in in-

creased sales of $1 slots. BLY has both domestic (Chicago and Las Vegas) and foreign (Dublin) slot manufacturing facilities. In addition, a limited number of specialty machines are manufactured in Reno. BLY also has a plant in West Germany, which manufactures German gaming machines solely for the German market.

BALLY SALES OF GAMING MACHINES

	1978E	*1977*	1976	*1975* (000)	*1974*	*1973*	*1972*	1971
Domestic	$46,000	$23,736	$13,378	$ 7,913	$10,367	$ 6,406	$ 7,710	$6,310
Foreign	9,000	11,505	9,977	12,982	23,877	19,273	13,189	9,189
Total	$55,000	$35,241	$23,355	$20,985	$34,244	$25,679	$20,899	$15,499
German*	$29,000	$27,273	$35,838	$38,847	$36,019	$30,565	$15,840	NA

The sharp decline in foreign slot machine sales in 1975 was the result of a change in slot machine regulations in Japan. Prior to that, Japan had become BLY's largest foreign slot machine customer (sales rose from $1MM in 1972 to $6MM in 1973 to $10.4MM in 1974). In addition, the initial sale of 1300 slot machines ($2.1MM) to Puerto Rico (after limited legalization in 1974), helped that year's figures. Domestically, a combination of higher prices, a steadily growing Nevada gaming industry, and a shift from single coin to multiple coin slots have all contributed to a doubling of average annual slot sales between the late-1960's and the mid-1970's. Recently, the domestic slot machine business has picked up dramatically. This has been

* Acquired April 1, 1972.

a function of continuing inflation, an almost explosive growth in the popularity of dollar slot machines, and rapid casino expansion throughout Nevada and now Atlantic City. Further, inflation and a growth in the popularity of dollar slot machines plus the possibility of additional casinos should result in this figure keeping at or possibly rising above current levels next year. Additional casinos and a new dollar coin almost assures this area of BLY's business rising to new record levels in 1980.

The typical slot machine manufactured by BLY today sells for $2,500 to $4,000 ($1 machines list for $3,900). Although no official profit figures have ever been given, it is widely believed that BLY generates about a 40% pretax profit margin on its slot machines. We further estimate that in recent yaers this figure may have been as low as 30%.

This data leads us to believe that if BLY's slot revenues nearly double by 1980 to approximately $100MM, EPS (assuming full dilution) from this source could reach $1.50 to $2.00. Assuming a continuing high level of new casino development, annual slot machine earnings in the 1980s of $1.50 to $2.00 per share do not appear unreasonable.

In addition, we estimate the incremental slot business carries a 50% pretax profit margin. This means that if the average machine sells for about $2,500, each additional sale of 1,000 machines will add $0.05-0.06 to earnings per share. (1,000 machines x $2,500 x 50% pretax x 50% tax rate ÷ 12MM shares — $.05-.06 per share.)

Probably the scarcest commodity in the casino industry is skilled managerial talent. Since slot machines make

fewer demands on managerial time, it is reasonable to expect that if there are a large number of new casinos, slot machines will play even a more prominent part in these casinos than they have until now. It is also logical to assume that BLY's on-line slot data system will account for an important part (over 10% in dollars) of their total slot business. All of this adds up to more unit slot machine sales at better prices in the 1980s. Thus, potential BLY slot sales could even rise above the $100MM level. Remember, however, four things:

> Today the whole state of Nevada has about 60,000 slot installations.
>
> Resort International's single Atlantic City casino currently has about 1,400 slots in approximately a 50,000 square foot casino.
>
> It would take about 33,000 slot machine sales at $3,000 per slot to equal $100MM.
>
> Without innovation or coin modifications, slot machine life is quite long. (This explains why, even today, well-used machines easily sell for prices of $1,000 and more.) Without new casinos, innovations and changes in coin styles, slots in well-run casinos appear to last 7-10 years. This would mean that about 6,000-9,000 of the slots in use in Nevada today would have to be replaced annually. Under these assumptions, Nevada replacement demand is worth $15MM-27MM to BLY.

On the other hand, the possibility of new geographic areas legalizing slots could double, triple or even more

than quadruple the slot machine market. Currently, England* and Australia are BLY's biggest foreign markets. Spain, which recently approved casino gaming, should become an important new market soon and we believe this could be followed by Mexico in 1980 or 1981. The German gaming machines made by BLY's German subsidiary are virtually unique to that market. Under German law, a German gaming machine must be taken out of service in Germany after three years use. At that time, they must either be scrapped or disposed of in the few locations that utilize these machines. BLY's Gunter Wulff German subsidiary, acquired for $11.7MM in April, 1972, has about a 35% share (historically, this share has ranged to nearly 50%) of the German gaming machine market. It is one of the two principal manufacturers of machines in that country. Prior to acquisition, the company had a 44% pretax profit margin. We believe margins have stayed in the 40% to 45% range.

As stated earlier, the estimanted EPS numbers by operation on the cover are very rough approximations on our part, but they illustrate a point that we believe to be highly accurate. Historically, as went gaming machines, so went BLY. Given our optimistic forecast about prospects for this area, this can't be all bad. However, it appears that management, while primarily keeping BLY in the "games of chance" industry, has markedly broadened the ways BLY is participating in this industry. We all know this diversification is scheduled to take a major

* The Royal Commission report on gaming makes recommendations which include some liberalizations of slot machine use beginning next year.

step in 1979 with the opening of BLY's first casino. Until now, however, this diversification has taken two important routes. One has been the manufacture of pinball and video games and the other has been distribution and operation of games. In recent years, these diversifications have resulted in the company developing other significant sources of earnings.

PINBALL AND VIDEO ARCADE GAMES

The non-slot machine "games of skill" area, generally thought of as pinball, but actually encompassing flipper pinball and in-line pinball, has fallen on hard times

• • • •

In the case of BLY, its ultimate conclusion was that BLY qualified to receive a license in Nevada as a publicly traded company which today permits it to engage in gaming in that State.

CONCLUSION

We believe the casino gaming business and, to a lesser extent, the pinball machine business are going to grow substantially over the next five years. BLY Manufacturing Corp. is the world's leading manufacturer of slot and pinball machines. While stocks with a potential involvement in the developing casino gaming industry have surged and then collapsed, investors appear to have not dug too deeply into the investment merits of the various companies. Bally Manufacturing, with its already

Paine Webber Mitchell Hutchins, Inc. Basic Analysis of Bally Manufacturing Corporation (October 31, 1978)

exeellent growth record, will benefit more than anyone else from further growth in the casino gaming business.

Slot machines are the cornerstone of every major domestic casino operation. BLY's 80% market share and product leadership assures them of the bulk of all slot machine sales for at least the next several years. A shift to a new dollar coin in 1980 will probably further stimulate slot machine sales at that time.

One of the most critical problems facing the developing casino gaming industry is lack of skilled managers. Slot machines requiring little skill from players and managers alike, fit the bill at this time.

BLY will probably be one of the next casinos to open its doors in Atlantic City. With $50MM in hand from the recent convertible debenture offering, BLY has the financial wherewithal to do this while it is likely that others with less financial muscle will see their plans falter.

In recent years more of the company's activities have been shifted into distribution and operation rather than just manufacturing. While the gross margins on these newer activities are lower, the continuity of their income is better.

In the final analysis then, BLY on its past record and leadership position in the industries it serves is an interesting investment vehicle. But with the virtual explosion in casino gaming developments, Bally Manufacturing appears to be uniquely positioned to take advantage of all aspects of these developments. At the same time, it must be realized that casino gaming is a regulated business activity. Thus, as new geographical legalized

Paine Webber Mitchell Hutchins, Inc. Basic Analysis of Bally Manufacturing Corporation (October 31, 1978)

gaming areas open, some will be regarded as favorable regulatory environments while others will not. BLY will almost assuredly sell slot machines in all of these markets and thus benefit from these developments and yet not have its profitability restricted because the regulatory climate is unfavorable. We expect as long as investors' perceptions indicate that legalized casino gaming will continue to grow geographically and rapidly, BLY will sell at a premium to most other gaming related issues.

BLY's multiple is currently below that of many other gaming related issues based on our projections of its prospects over the next several years. Hence, we recommend the purchase of BLY common stock at present levels.

October 31, 1978 Lee S. Isgur (212) 437-6243

Excerpt from Bally Manufacturing Corporation 1977 Annual Report

Slot machines—Bally has been one of the world's leaders in the manufacture and sale of slot machines since 1963 when it introduced the first modern, electro-mechanical machine. We now manufacture more than 60 different models. The importance of slot machines to the gaming industry is evidenced by the fact that revenues from slot machines accounted for approximately 38% of gross gaming revenues in Nevada in 1977.